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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
MARC SOBEL	)	
	)	
Applicant for Certain Part 90 Authorizations in the Los Angeles Area and Requestor of Certain Finder's Preferences	)	**WT DOCKET NO. 97-56**
	)	
MARC SOBEL AND MARC SOBEL d/b/a AIR WAVE COMMUNICATIONS	)	
	)	
Licensee of Certain Part 90 Stations in the Los Angeles Area	)	

To: The Commission

CONSOLIDATED BRIEF AND EXCEPTIONS

(as corrected by Errata filed on January 13, 1998)

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SUMMARY

The institution of license revocations proceedings against Sobel for an alleged unauthorized transfer of control without giving him prior written notice and an opportunity to demonstrate or achieve compliance violate Section 9(b) of the Administrative Procedure Act. This was particularly true because Sobel had repeatedly sought from the Bureau a statement of the issues against him, and was consistently refused.

The "resale" or "channel capacity lease" arrangement whereby Kay uses the airtime capacity of Sobel's repeaters to provide SMR services to his own customers is an acceptable arrangement. Sobel remains actively involved on a day-to-day basis in the operation and maintenance of the licensed facilities, and exercises the requisite degree of supervision and oversight. There was no unauthorized transfer of control.

Sobel's affidavit submitted by Kay in Kay's license revocation proceedings was offered to demonstrate Sobel's existence and separateness from Kay and to correct the Commission's mistaken belief that Sobel was a fictitious alias being used by Kay. The affidavit did not constitute misrepresentation or lack of candor simply because it failed to affirmatively disclose an agreement between Sobel and Kay. Sobel had previously acknowledged a business relationship with Kay. Moreover, he reasonably believed the agreement already had been or would soon be provided to the Commission by Kay, and the agreement was in fact produced shortly after Sobel's affidavit was filed. The record does not reveal an intent to deceive on Sobel's part.

Denial of all of Sobel's applications and the revocation of all his licenses is an overbroad and harsh sanction, even assuming some transgression. Sobel has no past record of misconduct. There is no evidence of deliberate or intentional misconduct. Even assuming inadvertent transgressions, only a fraction of Sobel's authorized facilities were implicated, making total revocation unwarranted.

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CONSOLIDATED BRIEF AND EXCEPTIONS

Marc D. Sobel d/b/a AirWave Communications ("Sobel"), by his attorney and pursuant to Section 1.276(a)(1) of the Commission's Rules and Regulations, 47 C.F.R. § 1.276(a)(1), hereby submits his consolidated brief and exceptions to the *Initial Decision of Administrative Law Judge John M. Frysiak* ("*Initial Decision*"), FCC 97D-13, released November 28, 1997, in support whereof the following is respectfully shown:

I. STATEMENT OF THE CASE

A. Factual Background

1. Sobel's UHF Repeater and Other Land Mobile Business Operations

Sobel owns and operates a sole proprietorship doing business under the name AirWave Communications. Tr. 174-175.[1] He has been involved professionally in the Los Angeles mobile radio business for twenty years. He first obtained licenses for UHF repeaters (in the 450 MHz and 470-512 MHz ranges) starting in 1978. Tr. 68. The UHF repeaters are operated exclusively by Sobel. Tr. 119. Sobel personally prepared the FCC applications for the UHF repeaters, he purchased or leased the equipment, he constructed the repeaters, and he maintains and repairs them. Kay has no involvement with the UHF repeaters except that he sublets space to Sobel at some of the repeater sites. Tr. 177-186. Sobel personally markets, contracts, bills, and collects for service on the UHF repeaters. Tr. 119, 287. The UHF repeater service represents about half of Sobel's business revenues. Tr. 249. The other half comes from Sobel's provision of goods and services to other mobile radio operators in the Los Angeles area. Tr. 250. He is an authorized equipment dealer for several manufacturers, he installs, repairs, and maintains radio systems, and he provides consulting services relating to the design and operation of mobile radio systems. Tr. 68, 250.

[1] The hearing transcript initially issued was incorrectly paginated (each page being numbered 13 pages less than the correct value). The page references herein are to the corrected version of the transcript.

2. Sobel's Relationship With Kay

Kay and Sobel have been friends for 20 years. Tr. 71, 326-327. Sobel first introduced Kay to the repeater business in approximately 1979 or 1980. Tr. 183. Kay began obtaining FCC licenses, established his own repeater business, and has built it into a company that today sells service on approximately one hundred 800 MHz repeaters (about 75 licensed to Kay and 20 to 25 licensed to others and marketed or managed by Kay) and employs approximately 15 to 16 people. Tr. 330-334. Sobel and Kay are "friendly competitors" in the provision of repeater services and often refer customers to one another. Tr. 182, 318-319. Kay regularly purchases equipment and parts from Sobel. Tr. 136. Kay contracts with Sobel for the construction and maintenance of most of his repeaters. Tr. 72, Kay also relies on Sobel when there are unusual or complex technical issues beyond the capability of Kay's own employees. Tr. 105-107, 328-329. Sobel has never been an employee of Kay; his services to Kay have always been performed as an independent contractor. Tr. 246-247. Payments from Kay represent a small portion of Sobel's total income. For the tax years from 1991 through 1996, for example, less than 10 to 15 percent (depending on the year) of Sobel's gross business revenues were attributable to goods and services provided to Kay. The other 85 to 90 percent of Sobel's business revenue is derived from his UHF repeater business and his equipment sales and consulting services to clients other than Kay. Tr. 251-257.

3. The Sobel-Kay Resale Arrangement Regarding Sobel's 800 MHz Repeaters

In the early 1990's Sobel became interested in obtaining 800 MHz repeater authorizations. Tr. 68. By this time Kay's repeater business was well established and Kay was already operating 800 MHz repeaters. Sobel enlisted Kay's assistance. Tr. 78. Kay assisted Sobel in the preparation and filing of 800 MHz applications. Kay already had a specialized software package that generated the appropriate application forms. Kay prepared most of the applications subject to Sobel's supervision. Tr. 74-75, Sobel personally reviewed, approved, and signed every submission to the FCC. Tr. 207, 222-223.

Sobel and Kay entered into an oral understanding regarding Sobel's 800 MHz repeaters. Kay would lease equipment to Sobel from his inventory. Where a repeater was to be installed at a site where Kay already had a lease, Kay would sublet space to Sobel. Kay would market services on the repeaters, including contracting with customers, collection, and billing. Kay would pay the expenses incurred in operating the system. In lieu of monthly payments for equipment rental and site lease, Kay would retain the first $600 in monthly revenue per repeater. All revenue thereafter would be divided equally between Sobel and Kay. In addition, Sobel would construct, maintain, and repair the repeaters but would be paid for these services on an hourly basis by Kay. Tr. 103-104, 106, 108.

Sobel and Kay have a "resale" or "channel capacity lease" arrangement. Sobel is a facilities-based licensee providing repeater airtime capacity to Kay who then resells it directly to end users. Kay obtains the 800 MHz channel capacity that he resells from a variety of sources. Some comes from stations licensed to him personally, some from 800 MHz stations licensed to Sobel, and some from stations licensed to others. Kay pools these resources to provide sufficient capacity to efficiently meet the needs of his customers. Tr. 316-317, 345-346, 374-375.

4. The Written "Management" Agreement

In late September or early October of 1994, Kay obtained a draft of a hearing designation order to institute license revocation proceedings against Kay. Included in the draft order was the following language: "Information available to the Commission also indicates that James A. Kay, Jr. may have conducted business under a number of names. Kay could use multiple names to thwart our channel sharing and recovery provisions ... . We believe these names include ... AirWave Communications [and] Marc Sobel, d/b/a AirWave Communications." Tr. 258-263. Upon learning of this Sobel asked that the oral arrangement be reduced to writing to document his existence and that his business operations and interests were separate and distinct from Kay's. *Id.* Kay and Sobel did not do anything differently regarding the 800 MHz repeaters after reducing the oral agreement to writing. Tr. 263.

The law firm of Brown and Schwaninger ("B&S"), who served as FCC counsel to both Sobel and Kay, prepared a written agreement. The written agreement was a "boilerplate" form provided by B&S and "it fit pretty close" to the oral arrangement. Tr. 361. B&S assured Sobel that the agreement satisfied applicable FCC requirements. Tr. 263-264. Sobel and Kay first executed the agreement on October 30, 1994, WTB Ex. 40, but they omitted some call signs and Kay neglected to effect an option provision, and so a virtually identical agreement was re-executed on December 30, 1994. Tr. 110-111, 264-265.

5. The Kay License Revocation Proceedings

On December 13, 1994, the Commission instituted license revocation proceedings against Kay in WT Docket No. 94-147. *James A. Kay, Jr., Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture* ("*Kay HDO*"), 10 FCC Rcd 2062 (1994). The Commission believed Kay was the "holder" of 164 licenses, listed in Appendix A to the *Kay HDO*. *Id.* at ¶ 1. The list of authorizations subject to revocation included 11 licenses issued in the name of Marc Sobel. *Id.*, Appendix A at 14. The *Kay HDO* included the same language as the draft Kay had obtained through FOIA: "Information available to the Commission also indicates that James A. Kay, Jr. may have conducted business under a number of names. Kay could use multiple names to thwart our channel sharing and recovery provisions ... . We believe these names include ... AirWave Communications [and] Marc Sobel, d/b/a AirWave Communications." *Id.* at ¶ 3.

B. Procedural History

This proceeding was initiated by the *Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing and for Forfeiture*, FCC 97-38, released February 12, 1997) ("*HDO*"). The following issues were designated:

(a) To determine whether Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications have willfully and/or repeatedly violated Sec. 310(d) of the Communications Act of 1934, as amended, by engaging in unauthorized transfers of control of their respective stations to James A. Kay, Jr.;
(b) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications are qualified to be and remain Commission licensees;
(c) To determine whether the above-captioned applications filed by Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications should be granted.
(d) To determine whether the above-captioned licenses held by Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications should be revoked.

HDO at 6. Upon the Bureau's motion and over Sobel's opposition, Presiding Administrative Law Judge John M. Frysiak ("ALJ") added the following issues:

(a) To determine whether Marc Sobel misrepresented material facts or lacked candor in his affidavit of January 24, 1995.
(b) To determine, based on the evidence adduced pursuant to the foregoing issue, whether Marc Sobel is basically qualified to be and remain a Commission licensee.

Memorandum Opinion and Order at 2-3, FCC 97M-82, released May 8,1997.

The ALJ resolved all issues against Sobel.

II. QUESTIONS OF LAW PRESENTED

(a) Does the institution of license revocations proceedings for an alleged unauthorized transfer of control without giving the licensee prior written notice and an opportunity to demonstrate or achieve compliance violate Section 9(b) of the Administrative Procedure Act?

(b) Does a "resale" or "channel capacity lease" arrangement in which the reseller uses the underlying capacity of the licensee's system to provide SMR services to the reseller's own customers, with the licensee remaining actively involved on a day-to-day basis in the operation and maintenance of the licensed facilities, constitute a transfer of control?

(c) Did an affiant's statements, offered to demonstrate his existence and separateness from another party and to correct the Commission's mistaken belief that affiant was a fictitious alias being used by another party, constitute misrepresentation or lack of candor because it failed to affirmatively disclose an agreement between affiant and the other party, when (a) affiant had previously acknowledged a business relationship with the other party, (b) affiant reasonably believed the agreement already had been or would soon be provided to the Commission by the other party, and (c) the agreement was in fact produced shortly after affiant's statements?

(d) Did the ALJ err in resolving misrepresentation and lack of candor issues against a licensee in the absence of any evidence of deceptive intent?

(e) Is total disqualification, denial of all applications, and revocation of all licenses, an appropriate sanction where: (a) the licensee has no past record of misconduct; (b) there is no evidence of deliberate or intentional misconduct; and (c) only a small fraction of the licensee's authorized facilities were implicated?

III. ARGUMENT

A. The Designation Order was Adopted in Violation of the Administrative Procedure Act.[6]

Section 9(b) of the Administrative Procedure Act ("APA") provides in pertinent part: "Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, *before the institution of agency proceedings therefor*, the licensee has been given — (1) *notice by the agency in writing* of the facts or conduct which may warrant the action; and (2) *opportunity to demonstrate or achieve compliance* with all lawful requirements." 5 U.S.C. § 558(c) (emphasis added). This provision "makes revocation unlawful unless the licensee is given notice and an opportunity to demonstrate or achieve compliance with all lawful requirements *before proceedings are instituted*." *Pass Word, Inc.*, 86 F.C.C.2d 437, 440 (1981) (emphasis added). The purpose of Section 9(b) is to protect licensees from "unfair surprise" in enforcement proceedings and to afford a noncompliant licensee a "second chance" to bring itself into compliance prior to imposition of the ultimate and extreme sanction of license revocation. *See, e.g., Air North America v. Department of Transportation*, 937 F.2d 1427 (9th Cir. 1991); *Hutto Stockyard, Inc. v. Department of Agriculture*, 903 F.2d 299, 304 (4th Cir. 1990); *Lawrence v. Commodities Futures Trading Commission*, 759 F.2d 767 (9th Cir. 1985); *Great Lakes Airlines, Inc. v. CAB*, 291 F.2d 354 (9th Cir. 1961). A licensee is thus entitled to "an opportunity to change his conduct before his license can be revoked." ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT at 90-91 (1947). "[I]f a particular licensee should under ordinary circumstances transcend the bounds of the privilege granted to him, the agency which has granted him the license must inform him in writing of such conduct and afford him an opportunity to comply ... before it can revoke ... his license." *Id*

The misconduct alleged against Sobel in the *HDO* did not constitute "willfulness" within the meaning of Section 9(b).[7] The "willfulness" exception to Section 9(b) applies only in the case of an intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof.[8] The willfulness must be manifest. *Packing Co. v United States*, 350 F.2d 67 (10th Cir. 1965). The licensee must have acted intentionally or with notorious neglect of

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[6] Section 1.106(a)(1) of the Rules allows a petition for reconsideration of a hearing designation order only "if, and insofar as, the petition relates to an adverse ruling with respect to petitioner's participation in the proceeding." 47 C.F.R. § 1.106(a)(1). There is no pre-hearing opportunity to challenge a designation order on other grounds. It is therefore appropriate for Sobel to present, in these exceptions, his objections to the designation order.

[7] Section 312 of the Communications Act defines "willful" as "the conscious and deliberate commission or omission of [an] act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States." 47 U.S.C. § 312(f)(1). "Willfulness" as used in Section 9(b) of the APA, however, must have a more restrictive meaning, lest the exception apply to virtually any license revocation proceeding under Section 312, clearly not what Congress intended.

[8] The "public health, interest, or safety" exception is also inapplicable here. The term "public interest" as used in Section 9(b) means something more than the general public interest standard applicable to all agency actions. *Air North America v. Dept. of Transportation*, 937 F.2d 1427 at n.8 (9th Cir. 1991).

"explicit provisions" of law. *Eastern Produce Co. v. Benson*, 278 F.2d 606 (3rd Cir. 1960). The *HDO* charged Sobel with violating Section 310(d) of the Communications Act. 47 U.S.C. § 310(d), by virtue of a management agreement with Kay. But Section 310(d) does not address management agreements, nor is there any Commission regulation spelling out the circumstances in which a management agreement may be considered an unauthorized transfer of control. Indeed, in making the case that Sobel had allegedly violated Section 310(d), the HDO relies on a 1963 Commission decision, *Intermountain Microwave*, 24 RR 983 (1963), and subsequent cases interpreting it. But at the time Sobel and Kay entered into the management agreement *Intermountain Microwave* was not followed by the Commission with respect to SMR services. Even if the agreement did constitute a transfer or control, Sobel did not act in intentional violation or wanton disregard of any "explicit provision" of law.

The *HDO* was Sobel's first notification that the Bureau believed he had engaged in conduct that warranted license revocation. Sobel had no reason to know that the Bureau believed there had been an unauthorized transfer of control of his stations to Kay by virtue of the management agreement; indeed, he was justified in thinking otherwise. A copy of the management agreement had been provided to the Bureau as early as March of 1995. Counsel for Sobel orally advised the Bureau in early 1996 that there was a written agreement between Sobel and Kay, and reminded Bureau staff that a copy of it had been produced in discovery in WT Docket No. 94-147. Sobel provided another copy of the management agreement to the Commission with his July 3, 1996 response to the Bureau's 308(b) request. The Bureau had the management agreement in its possession for nearly two years prior to the *HDO*, but it did not once during that time notify Sobel, in writing or otherwise, that he was allegedly guilty of an unauthorized transfer of control, and certainly not that the alleged misconduct warranted license revocation.

The Section 308(b) letters sent to Sobel on January 19, 1996, SBL Ex. 6, p. 24, and on June 11, 1996, SBL Ex. 6, pp. 36-37, did not satisfy the written notice requirement of Section 9(b). The letters merely state that "At the time of designation [of WT Docket No. 94-147], the Commission believed ... some of [Sobel's] licenses were in fact controlled by Mr. Kay." Even assuming this were notice of a suspected unauthorized transfer of control, it is not notice of "facts or conduct which may warrant" license revocation. An unauthorized transfer of control is not grounds for disqualification in the unless coupled with an intent to deceive or other disqualifying conduct.[9]

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[9] *E.g.*, *Deer Lodge Broadcasting, Inc.*, 86 FCC 2d 1066, 49 RR 2d 1317 at ¶¶ 63-67 (1981); *Blue Ribbon Broadcasting, Inc.*, 90 FCC 2d 1023, 51 RR 2d 1474 at ¶¶ 7-9 (Rev. Bd. 1982); *Silver Star Communications - Albany, Inc.*, 3 FCC Rcd 6342 at ¶¶ 52-58 (Rev. Bd. 1988), *aff'd* 6 FCC Rcd 6905, 70 RR 2d 18 at ¶¶ 13-20 (1991); *Roy M. Speer*, 11 FCC Rcd 18393 at ¶ 88 (1996). While this principal evolved in broadcast cases, it applies equally in the wireless services. *Brian L. O'Neill*, 6 FCC Rcd 2572, 69 RR 2d 129 at ¶ 30 (1991); *Century Cellunet of Jackson MSA Limited Partnership*, 6 FCC Rcd 6150, 70 RR 2d 214 at ¶ 8 (1991); *Catherine L. Waddill*, 8 FCC 2710, 72 RR 2d 500 at ¶ 19 (1993).

The assertion in the 308(b) letters that, at the time of the *Kay HDO*, the Commission believed Kay was in control of Sobel's licenses was at best ambiguous and at worst blatantly false. The *Kay HDO* did not: (a) name Sobel as a party, (b) alleged a transfer of control by virtue of a business relationship between Sobel and Kay, or (c) designate an unauthorized transfer of control or a real party-in-interest issue. The *Kay HDO* assumed that Sobel was a fictional alias used by Kay for untoward purposes. Indeed, the Commission later confirmed that Sobel's licenses were included "because information indicated that Kay may have conducted business under a number of names." *James A. Kay, Jr.*, 11 FCC Rcd at 5324. After withdrawal of the first Section 308(b) letter and only a month prior to issuance of the second one, the Commission expressly stated "there is no reason at this time to subject [Sobel] to possible sanctions." *Id.*[10] The 308(b) letters were not adequate notice for purposes of Section 9(b).

For more than a year prior to designation, Sobel repeatedly and continuously requested a statement of the Bureau's concerns and an opportunity to address them informally. Sobel volunteered to travel from California to either Washington. or Gettysburg to meet with Bureau staff, to provide any required information, and to be apprised of the nature of any concerns and how they might be resolved. The Bureau ignored Sobel's entreaties while continuing its unexplained inaction on his pending applications. Sobel was so frustrated that he eventually sought a judicial writ of mandamus to compel the Commission "to immediately resume processing [Sobel's pending applications] ... or to provide Sobel with a detailed statement of the reasons" for its continued inaction. *SBL Ex. 6* at 9. Sobel also requested that he be given "a meaningful opportunity to respond" prior to the designation of any hearing. *Id.* at 10. In other words, although Sobel had no idea that license revocation proceedings were being contemplated, he specifically sought the rights guaranteed him by Section 9(b) of the APA, and the Bureau was on actual notice of this request.

In reaction to the mandamus request, and without prior notice to Sobel, the Bureau arranged for the *HDO*, seeking revocation of all of Sobel's licenses. In the January 27, 1997 response to the mandamus request[11] it was revealed that the Bureau had presented to the Commission an item addressing the Sobel matter, but neither the nature of the item nor what action it recommended was disclosed. On January 31, 1997, Sobel wrote directly to the Commissioners and the Chief of the Bureau, requesting that:

> prior to acting on the staff recommendation before you, whatever it may be, you first give Mr. Sobel an opportunity to come forward and to hear first hand what the Bureau staff's concerns are. Mr. Sobel will use his best efforts to answer all questions, and to reach a mutually satisfactory resolution of the matter. Mr.

[10] If, between May 7, 1996 (when the Commission declared there was no reason to impose sanctions on Sobel) and June 11, 1997 (when the Bureau issued the second 308(b) request), the Bureau discovered new information, it was never revealed during discovery or at hearing.

[11] *FCC Opposition to Petition for Writ of Mandamus* filed with the United States Court of Appeals for the District of Columbia Circuit on January 27, 1997 in Case No. 96-1361.

> Sobel is prepared to come to Washington on short notice to meet with you, your staff, or any other Commission personnel necessary to advance this matter.

Sobel's request was ignored for several days, despite repeated telephone calls to the Bureau Chief's office. Then, on or after February 6, 1997, Bureau counsel telephoned counsel for Sobel stating that Bureau staff would be willing to meet, but that there was little to discuss insofar as the Commission had already adopted a hearing designation order. It was through this telephone call that Sobel learned for the first time that Bureau was seeking revocation of Sobel's licenses because of an alleged unauthorized transfer of control to Kay.[12]

Sobel again wrote to the Commissioners on February 11, 1997, asking that public release (and hence effectiveness) of the *HDO* be deferred to provide a pre-hearing opportunity to resolve the matter. The *HDO* was released the next day, February 12, 1997. Only then did Bureau staff agree to meet with counsel for Sobel, but at that meeting the Bureau took the position that Section 1.93(b) of the Commission's Rules, 47 C.F.R. § 1.93(b), precluded any possibility of a resolution without hearing because basic qualifications issues had been designated against Sobel. For more than a year the Bureau ignored or refused Sobel's continuous and repeated requests for a specific statement of the charges against him and an opportunity to respond or resolve matters. The Bureau eventually agreed to a meaningless after-the-fact meeting at which it then pointed to the *HDO*, the fact and timing of which the Bureau had orchestrated,[13] as an excuse for not dealing with Sobel. The combination and timing of these actions and inactions demonstrate bad faith on the part of Bureau staff, further exacerbating an already blatant violation of Sobel's Section 9(b) rights.[14] The Commission should reconsider and set aside the *HDO*.

B. Sobel Did Not Engage in an Unauthorized Transfer of Control.

1. The ALJ Failed to Recognize the Resale Nature of the Sobel/Kay Relationship.

The ALJ ignored the key argument (and all of the supporting evidence) advanced by Sobel under the transfer of control issue, namely, that the business relationship between Sobel and Kay is a legitimate resale or channel capacity lease arrangement. Sobel is a facilities-based 800 MHz repeater licensee, and Kay is a reseller of airtime available on Sobel's repeaters. Sobel and Kay both testified that they considered their arrangement to be a resale arrangement or channel capacity lease—something common throughout the telecommunications industry,

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[12] Sobel anticipated, but sought to avoid, a possible hearing pursuant to Section 309 of the Communications Act. The designation of a hearing pursuant to Section 312 came as a complete surprise.

[13] The Bureau has a role in the public release and Federal Register publication of orders it has recommended to the Commission for adoption. Sobel suspects, but of course can not prove, that the Bureau (a) expedited the release of the designation order (or at least made no effort to delay it) prior to any opportunity for the Commission to respond to Sobel's February 11 letter, and (b) delayed Federal Register publication to give itself additional time to move for enlargement of issues. *See Motion for Special Relief*, filed by Sobel on May 5, 1997.

[14] The Bureau's treatment of Sobel was also atypical and therefore discriminatory. *See* footnote 31, below.

including SMR and other wireless services such as cellular and paging. Tr. 128-129, 153, 190-192, 374-375. Asked by the Bureau if Kay was not actually more than a mere reseller, Sobel testified:

> The primary business here was to resell spectrum space, capacity. That was the whole purpose of putting up a repeater. I would say yes, we did other things, but it was to support a repeater so the capacity could be sold. You don't make money unless you sell the system to other people.

Tr. 153. Resale is, therefore, the essence of the business relationship between Sobel and Kay.

Many things pointed to by the ALJ as evidence of a transfer of control are actually characteristics of an entirely proper resale arrangement. The ALJ supported his conclusion at least in part on his finding that Kay markets the service sold on the stations, that Kay negotiates and enters into contracts with end users, and that Kay receives and deposits the monies paid by his users. *Initial Decision* at ¶ 67. These are not indicia of control but rather the ordinary and customary practices of a reseller. Kay sells 800 MHz repeater airtime which he obtains from a variety of sources. Some comes from the stations licensed to him personally, some from stations licensed to Sobel, and some from stations licensed to others. Kay then pools these resources to provide sufficient capacity to efficiently meet the needs of his customers. Tr. 316-317, 345-346, 374-375. Who holds the license, *i.e.*, who is the facilities based carrier (or what the ALJ referred to as "ownership") is of no consequence to the end user and therefore is of little importance. Tr. 345-346.

Kay negotiates and contracts with the end users because they are Kay's (not Sobel's) customers. As Sobel testified. "It's [Kay's] customer. It's his contract." Tr. 119. The typical convention in the Los Angeles repeater service industry is that the service contract with the end user belongs to the dealer, who is often *not* the repeater licensee. Tr. 190-192. It is to be expected that Kay is the one negotiating and signing the contracts and that Kay will collect and deposit the monies for the services he provides. Sobel's compensation comes not directly from end users, but rather from Kay in exchange for Sobel having made the channel capacity available to Kay for resale.

Resale arrangements do not transgress Commission policy, in fact, they are encouraged. *See, e.g., Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261, 271 (1976), modified on other grounds, 62 FCC 2d 588 (1977), *aff'd sub nom. AT&T v. FCC*, 572 F.2d 17 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978); *Cellular Communications Systems*, 86 FCC 2d 469, 511, 642 (1981), *modified*, 89 FCC 2d 58 (1982), *further modified*, 90 FCC 2d 571 (1982); *Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies*, 7 FCC Rcd 4006, 4008 (1992). The ALJ's analysis under the unauthorized transfer of control is therefore flawed because it failed to acknowledge and account for the fact that Kay is a reseller of Sobel's 800 MHz capacity.

2. The ALJ Incorrectly Applied *Intermountain Microwave* and *Motorola*.

There is no exact formula for determination of whether a transfer of control has occurred; it requires looking beyond questions of ownership and title to determine whether there are indications that another party determines the basic policies of the station. *See WHDH, Inc.*, 17 FCC 2d 856 (1969), *aff'd sub nom. Greater Boston Television Corp. v. FCC*, 444 F2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). This analysis requires examination of the specific circumstances on a case-by-case basis. The Commission typically considers the following six indicia of control, as announced in *Intermountain Microwave*:

(a) Does the licensee have unfettered use of all facilities and equipment?
(b) Who controls daily operations?
(c) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission?
(d) Who is in charge of employment, supervision, and dismissal of personnel?
(e) Who is in charge of the payment of financial obligations, including expenses arising out of operations?
(f) Who receives monies and profits from the operation of the facilities? 24 P&F (Rad. Reg.) (1963), *see also HDO* at ¶ 4.

Intermountain Microwave is not a mechanical check list for an objective determination of control, rather:

> The *Intermountain* factors represent the normal incidents of responsibility for the operation and control of a common carrier facility. ... As such, they generally provide useful guidelines for evaluating real-party-in-interest and transfer of control questions. *We stress, however, that there is no exact formula for determining control and that questions of control turn on the specific circumstances of the case. ... Thus, in applying the Intermountain criteria, we examine the totality of the circumstances.*

La Star Cellular Telephone Company, 9 FCC Rcd 7108, 7109 (1994) (emphasis added), *citing Data Transmission Co.*, 44 FCC 2d 935, 936 (1974). No single factor is controlling. Each particular situation is unique and must be carefully evaluated in light of all six factors. *Volunteers in Technical Assistance*, 12 FCC Rcd 13995 at ¶¶ 13-16 (1997).

Analysis of control varies from service to service, and depends on the nature of the particular industry. In the broadcast services, for example, station programming has been a significant area of consideration, *e.g.*, *S.W. Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981), while this is not a regulatory concern in common carrier and other radio services where the licensee does not provide content. *Cablecom General, Inc.*, 87 FCC 2d 784 (1981). As to SMR and dispatch services, the Commission articulated a concern that licensees be afforded flexibility in structuring their business arrangements:

> As the SMR industry has matured, licensees have inevitably sought to avail themselves of a variety of methods to operate and manage their systems. In this dynamic and developing marketplace we wish to allow maximum flexibility to these entrepreneurs, consistent with the regulatory restraints imposed by the Communications Act. We also wish to assure licensees may employ a variety of options so that they may provide an efficient and effective communications service to the public as quickly as possible. In light of theses policy objectives, and as a general proposition, *we see no reason why SMR licensees should be precluded from hiring third parties to manage their systems provided that that the licensees retain a*

proprietary interest, either as owner or lessee, in the system's equipment and exercise the supervision the system requires.

Motorola, Inc. (*Order*, issued 30 July 1985, File Nos. 50705 *et al.*) at ¶ 18.[15] As shown below, application of the *Intermountain Microwave* criteria in the SMR industry in light of Motorola leads to the conclusion that there was no unauthorized transfer of control of Sobel's licenses. The ALJ's failure to apply the proper analysis was error.

(a) Does the licensee have unfettered use of all facilities and equipment?

The ALJ erroneously stated: "The equipment was 'leased' to Sobel ..., but Sobel was given no title, interest, or control over the equipment, except to the extent he was granted permission to use Kay's equipment. *Initial Decision* at ¶ 19. In placing quotation marks around the word "leased" the ALJ unjustifiably questioned the bona fides of the equipment lease arrangement. The written agreement provides: "Agent shall lease to Licensee all equipment necessary to construct and operate the Stations. All rents to be collected by Agent for lease of equipment to Licensee shall be deemed by the Parties to be a portion of Agent's compensation for services described herein." SBL Ex. 3, p. 3, ¶ IV (emphasis added). This is consistent with the pre-existing oral agreement Tr. 104, 144, 147.

The ALJ's further conclusion that "Sobel was given no title [or] interest ... over the equipment" is likewise wrong. The very nature of a lease arrangement is that the lessor retains title to the property. That Sobel leases rather than owns the repeater equipment does not indicate a transfer of control. There is no rule or regulation prohibiting a licensee from leasing rather than purchasing the equipment used in its station. Indeed, the Commission has expressly stated that, in the SMR service, the licensee may establish its requisite "proprietary interest [in the station equipment] either as owner *or lessee*." *Motorola, Inc.* at ¶ 18. The *Microwave* "guideline of 'unfettered use' adopted [decades] ago in the context of a less sophisticated, 'mom-and-pop' owner, stand-alone microwave system must be construed in light of the current realities ...." *Ellis Thompson Corp., Summary Decision of Administrative Law Judge Joseph Chachkin* ("*ETC Summary Decision*"), 10 FCC Rcd 12554, 12556 (ALJ 1995). Even assuming Sobel's decision to lease from Kay warrants scrutiny in light of Kay's additional involvement with the 800 MHz repeaters, the record in this proceeding demonstrates that there were sound business reasons for Sobel to lease from Kay. *Cf. Ellis Thompson Corp.*, 10 FCC Rcd at 12557 (1995). (approving a licensee's decision to enter into an agreement "of his own free will for prudent financial and competitive reasons").

Finally, the ALJ's finding that "Sobel was given no ... control over the equipment, except to the extent he was granted permission to use Kay's equipment" is overwhelmingly contradicted by the record. It is indisputable that Sobel has compete and unrestricted access to the transmitter sites and the equipment used for his 800 MHz repeaters.

[15] Although not officially reported, the *Motorola* decision has become the lead case on the issue of whether SMR

Tr. 118, 189-190. He has unrestricted access to all transmitter sites, locations that are restricted and therefore not accessible to the public. He has the keys and/or the requisite security clearances for each location, and may access the sites as any time without notice to or permission of Kay. Tr. 189-190. He has control points for each repeater at his home office and in his work vehicle. He has all the security codes and is able to personally activate and deactivate both individual customers and the repeaters themselves. Tr. 224-227. "[A] licensee's unimpeded access satisfies the 'use' criterion" under *Intermountain Microwave. ETC Summary Decision*, 10 FCC Rcd at 12557, citing *Brian O'neill*, 6 FCC Rcd 2572, 2575 (1991) ("[T]he controlling factor [under the first *Intermountain* factor] is that access is unimpaired.").[16]

(b) Who controls daily operations?

The question whether control of a wireless system has been improperly ceded to a manager typically involves an absentee owner with very little involvement in the day to day affairs of the station. In contrast, Sobel resides in the stations' service areas and is a hands-on owner who has remained actively and fully involved in all aspects of the day to day operations. Tr. 293-294. Except for matters specifically and directly related to Kay's resale of airtime, Sobel has been solely responsible for and directly involved in daily operations. Sobel constructed the facilities and he maintains them. Tr. 104, 107. He regularly monitors the repeaters and frequently visits the transmitter sites. Tr. 117, 189-190. Sobel is most often the one who activates and deactivates subscribers. Tr. 124, 188-189. While Kay may activate customers on occasion, no customer gains access to Sobel's repeaters without Sobel's knowledge and approval. Tr. 188.

As to Sobel's 800 MHz stations, Sobel is the principal, Kay is his agent. Paragraph VIII of the written management agreement expressly provides:

> Supervision by Licensee: Licensee shall retain ultimate supervision and control of the operation of the Stations. Licensee shall have unlimited access to all transmitting facilities of the Station, shall be able to enter the transmitting facilities and discontinue any and all transmissions which are not in compliance with FCC Rules and shall be able to direct any control point operator employed by Agent to discontinue any and all transmissions which are not in compliance with FCC Rules. All contracts entered into with end users of the Stations' services shall be presented to the Licensee, either by original proposed contract or copy thereof, before such contracts go into effect, and Licensee shall have the right to reject any such contract within five (5) days of presentation, however, such rejection shall be reasonable and based on the mutual interests of the parties. Licensee shall have the right to locate the Stations' transmitting facilities at any place of Licensee's choosing, provided, however, that after the original construction of the transmitting facilities of the Stations is completed and/or following execution of this agreement, Licensee shall give sixty (60) days notice to Agent of any future relocation of any of the Stations. Such relocation shall only occur if it is in the best interest of both Parties.

[16] The Bureau argued that Sobel has equally unfettered access to Kay's sites and equipment, but this is a *non sequitur*. Sobel's access to Kay's equipment is necessary for Sobel to discharge his contract services for Kay. It is absurd to suggest that Sobel can only preserve the requisite degree of access to his own stations by giving up access to the equipment of other licensees for whom he performs contract maintenance services.

SBL Ex. 3, p. 5, ¶ VIII.[17] Sobel thus retains ultimate supervision over Kay through this contractual provision,[18] a significant factor totally ignored by the ALJ.[19]

(c) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission?

Sobel exercises a degree of control and oversight not usually enjoyed by a facilities-based carrier vis-à-vis its resellers. The price to be charged for repeater service is largely dictated by local industry standard, and Sobel has personally determined when to make adjustments. Tr. 123. He has even on occasion overruled Kay's initial determination as a reseller regarding the rates to be charged. *Id.* When special deals are negotiated, Sobel either handles it or knows about it. Tr. 129-130. Sobel has the right to approve or disapprove any service contracts entered into by Kay, Tr. 128-129. Sobel reviews Kay's customer contracts approximately once or twice per month. Tr. 122. Sobel also reviews with Kay the decisions regarding which customers to place on which repeaters. Tr. 123, 314-315.

Kay prepared much of the FCC and frequency coordination paperwork for the 800 MHz repeaters, subject to Sobel's supervision, review, and approval. This was a matter of convenience. Kay had a special software package that generated the appropriate forms. Tr. 74-75. On some occasions Sobel actually prepared the applications himself using Kay's computer. Tr. 74. Nothing was ever filed with the Commission on Sobel's behalf before Sobel reviewed, approved, and signed it. Tr. 207, 222-223. This was more than token approval. Sobel is intimately familiar with the application forms and procedures, having prepared his own UHF repeater applications as well as many applications for his clients and customers, Tr. 205-206, 215-222, and has first hand knowledge of the locations and facilities specified in the applications. Tr. 215.

The address used on the 800 MHz applications is Sobel's home office, which is also licensed as a primary control point. All FCC correspondence relating to the stations comes directly to Sobel. Tr. 225-229. When Kay prepared responses to FCC correspondence on Sobel's behalf, he became aware of such matters only through Sobel,

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[17] The agreement goes on to state: "Except as provided specifically herein, nothing contained herein shall provide to Licensee the ability to supervise directly any personnel employed by Agent." (SBL Ex. 3, p. 5, ¶ VIII.A) The Bureau erroneously argued that this deprives Sobel of requisite personnel authority under the fourth *Intermountain* factor. The provision excludes matters "provided specifically herein," thus preserving Sobel's supervisory rights as to matters expressly stated in the rest of Paragraph VIII or elsewhere in the agreement. The purpose of the provision is to clarify that Kay is acting as an independent contractors, and this is clear when it is read in conjunction with Paragraph V. (SBL Ex. 3, p. 3, ¶ V).

[18] The ALJ apparently attributed significance to term of the agreement and the absence of an express provision whereby Sobel can prevent automatic renewal. *Initial Decision* at ¶ 18. But Sobel may terminate if Kay breaches "an implied covenant of good faith and fair dealing [or fails] to perform [his] duties in a workmanlike manner. *ETC Summary Decision*, 10 FCC Rcd at 12557.

[19] The Bureau incorrectly asserted that Sobel's rights are limited to stopping noncompliant transmissions, *WTB Findings* at 42. The first sentence of Paragraph VIII is clear, self-contained, and unequivocal: "Licensee shall retain ultimate supervision and control of the operation of the Stations." The few qualifications in Paragraph VIII merely

and he became involved only at Sobel's request and under Sobel's supervision and oversight. *Id.* Sobel's use of Kay as a consultant for certain FCC licensing matters is standard practice in the SMR industry where licensees frequently rely on attorneys, engineers, and/or non-professional application preparation firms. Tr. 230-231. The Commission itself recognizes that Part 90 applications are often prepared by persons not affiliated with the applicant, such as equipment salesmen, engineers, etc. *See, e.g.*, FCC FORM 574 INSTRUCTIONS at 27, Item 37 (August 1989).

(d) Who is in charge of employment, supervision, and dismissal of personnel?

Sobel has no employees. Tr. 130. The maintenance and operation of the repeaters is not labor intensive. Tr. 266. Kay and Kay's employees, of course, sell service to end users and bill and collect for such services, but they are acting as resellers in this regard. They are not station employees. Kay has not hired any additional employees to do any work with respect to Sobel's 800 MHz repeaters. Tr. 266. It is entirely appropriate for Sobel to contract services to a third-party who, in turn, hires employees—maintenance of the requisite degree of control does not require Sobel to hire and supervise his own employees. *ETC Summary Decision*, 10 FCC Rcd at 12560.[20]

(e) Who is in charge of the payment of financial obligations, including expenses arising out of operations?

The major expenses relating to Sobel's 800 MHz repeaters are site rental and equipment lease payments. There are also power charges and telephone line charges (which are minimal in the case of Sobel's stations because he does not provide interconnected service). Finally, there may be occasional regulatory costs, such as frequency coordination fees, FCC application filing fees, and fees for Forestry Service permits for sites located on US Forest Service land. Sobel made a business decision and entered into a contract whereby Kay would assume these expenses and would, in return, be entitled to retain the first $600 per repeater of monthly revenue. Tr. 104, 144, 185-186, 295. Accordingly, Sobel pays the expenses by financing them out of future revenues. This is a legitimate business decision by the parties that should not be second-guessed by the Commission. "As long as the licensee maintains the requisite degree of control ... consistent with its status as a licensee, [the Commission] will not question its business judgment concerning the agreements into which it enters." *Motorola, Inc.* at ¶ 21.

This arrangement with Kay allowed Sobel to expand into 800 MHz at minimal financial risk. By trading equipment, site space, and other services to Kay in exchange for future revenue, Sobel eliminated the need for any monthly outlay. Sobel expected the repeaters to be loaded and generating revenue in a relatively short time, entitling him to half the revenue over $600 per month per repeater. He would also receive some income for installation and

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protect Kay's reasonable expectations as a reseller of airtime, and the very existence of qualifications shows that Sobel's rights are otherwise broad, not limited.

[20] *See also* footnote 17, *supra*.

maintenance. In the absence of this arrangement Sobel would incur monthly expenses for equipment loan or lease payments and for site rental. He would have to pay for construction and maintenance services or do the work himself as "sweat equity." He would have to market and contract for 800 MHz repeater services and either pay for or handle his own billing and collecting. Sobel, based on his experience in the repeater business, considered this a prudent business arrangement in every respect. Tr. 185-187, 309.

(f) Who receives monies and profits from the operation of the facilities?

Sobel contracted to receive half of all revenue beyond $600 per repeater per month, and based on his industry knowledge and experience, he expected to profit from the arrangement within one to two years. The only reason he has not actually received revenue pursuant to the agreement is that the Bureau has frozen processing on his applications and other filings Tr. 204-205. Even a voluntary deferral of distribution of profits by a licensee does not necessarily indicate a lack of control. *See ETC Summary Decision*, 10 FCC Rcd at 12561-12562. An involuntary deferral occasioned by regulatory delay certainly does not. The arrangement whereby Sobel and Kay are to divide equally revenue in excess of $600 per month per repeater is neither out of line with industry practice nor legally questionable on its face. The Commission has, in fact, approved SMR management agreements which provide for the manager retaining 70 to 80 percent of the revenue, or even 100 percent when the management duties are undertaken in contemplation of a purchase of the stations. *Motorola, Inc.* at ¶¶ 3, 8-10. The fact that Kay collects and deposits the revenues from end users is an entirely proper discharge of his role as a reseller.

The ALJ and the Bureau attribute far too much significance to Kay's option to acquire Sobel's 800 MHz stations. Sometime after Sobel and Kay began operating under the oral arrangement, they agreed that Kay would have a form of option or right of first refusal with respect to any sale of Sobel's 800 MHz authorizations subject to the agreement. Kay wanted the option arrangement because he was writing long term contracts for repeater service and wanted to be assured of continued access to Sobel's channel capacity. The option was later codified into the written agreement which provided a price of $100 per station to secure the option and a strike price of $500 per

station. Sobel and Kay also had an understanding that if there were ever a sale, Kay would be reimbursed for costs he incurred in efforts to clear the channel.[21] Tr. 108, 126-127 268-270, 365.

The fact of the matter is, neither Kay nor Sobel have been in a sales mode, they generally acquire stations and only sell them as part of "horse trading" with other licensee's to improve their systems. Tr. 267. The option price is a reflection of the value of the encumbered channels initially obtained by Sobel. Sobel and Kay understand that if a channel is sold, Sobel will receive more than the mere option price after providing for Kay's reimbursement for clearing expenses. For example, in one case here received $20,500 for the sale of a station (rather than merely $500), and in another case he declined an opportunity to sell his 800 MHz stations for $1,500,000. Tr. 274-275. In any event, it is well established that a mere option, until exercised, does not constitute a transfer of control. *Turner Broadcasting System, Inc.*, 101 FCC 2d 843, 849 (1985); *Miller Communications, Inc.*, 3 FCC Rcd 6477, 6479 (Mob. Serv. Div. 1988).

C. Sobel Did Not Intentionally Misrepresent or Conceal Material Facts.[22]

Misrepresentation is a false statement of material fact, while lack of candor is a concealment, evasion, or other failure to disclose a material fact. *Fox River Broadcasting, Inc.*, 93 FCC2d 127, 129, (1983). "A necessary and essential element of both misrepresentation and lack of candor is intent to deceive." *Trinity Broadcasting of Florida, Inc.*, 10 FCC Rcd. 12020, 12063 (1995). *See also Weyburn Broadcasting Limited Partnership v. FCC*, 984 F.2d 1220, 1232 (D.C. Cir. 1993); *Garden State Broadcasting Ltd. ship v. FCC*, 996 F.2d 386, 393 (D.C. Cir. 1993); *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1196 (1986); *Fox Television Stations, Inc.*, 10 FCC Rcd 8452, 8478 (1995); *Swan Creek Communications v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994); *Abacus Broadcasting Corp.*, 8 FCC Rcd 5110, 5112 (Rev. Bd. 1993); *Pinelands, Inc.*, 7 FCC Rcd 6058, 6065

[21] Sobel's 800 MHz channels were "encumbered," *i.e.*, the shared with other licensees. This limited their utility in providing service. To obtain exclusive status a licensee must arrange for the removal of all other co-channel licensees and load the channel to at least 70 customer units. The removal of co-channel licensees, *i.e.*, "clearing" the channel, is accomplished in by (a) acquiring the co-channel license by assignment, (b) contracting to have the co-channel licensee cancel its authorization, or (c) filing a finder's preference request (if the co-channel licensee has abandoned operations or failed to comply with the applicable construction and loading regulations). Expenses are incurred in clearing channels, including the cost of researching the status of the channel, legal, consulting, and frequency coordination costs, the cost of relocating any users the co-channel licensee may have (which may include modifying or replacing customer equipment), any cash payments negotiated by the co-channel licensee, etc. Sobel had limited time and financial resources and therefore relied on Kay to undertake most of this activity. Kay's efforts inure to the benefit of both Sobel and Kay by increasing the revenue potential of Sobel's 800 MHz repeaters. Tr. 193-200.

[22] The ALJ incorrectly stated that "Sobel has not offered any proposed findings on the added misrepresentation issues." *Initial Decision* at 15 n.3. In his *Proposed Findings of Fact and Conclusions of Law* Sobel offered no findings on the added issue because the Bureau had not met its burdens of proceeding and proof. However, Sobel expressly "denie[d] the allegations of misrepresentation and reserve[d] the right to reply to any proposed findings or conclusions offered by the Bureau on the added issues." *Id.* at 2 n.1. Sobel offered extensive reply findings and

(1992). Inaccuracy due to carelessness, exaggeration, faulty recollection, etc., do not suggest the deceptive intent normally required for disqualification. *See MCI Telecommunications Corp.*, 3 FCC Rcd 509, 512 (1988), *citing Kaye-Smith Enterprises*, 71 FCC 2d 1402, 1415 (1979); *Standard Broadcasting, Inc.*, 7 FCC Rcd 8571, 8574 (Rev. Bd. 1992). Indeed, it is the "willingness to deceive" that is most significant. *FCC v. WOKO, Inc.*, 329 U.S. 223, 227 (1946). The ALJ ignored all of the evidence and arguments presented by Sobel on the candor issue. Sobel now urges the Commission to examine the whole record in the proper context and to adopt the inescapable findings and conclusions supported by the evidence.[23]

1. The January 1995 Affidavits and the Management Agreement

The ALJ's erroneous concluded that Sobel lacked candor when he executed the January 11, 1995 and January 24, 1995 affidavits because they did not disclose the details of the management agreement. The affidavits are identical except for the dates, *see* page 4 and footnotes 2 & 3, above, and for the sake of clarity we hereafter refer only to the January 24 affidavit. The affidavit was prepared by B&S, communications counsel to both Kay and Sobel. B&S had also prepared the written management agreement less than three months earlier, and an addendum to it that was executed less than a month before the affidavit.[24] The affidavit was included as an attachment to Kay's January 24, 1995 *Motion to Enlarge, Change or Delete Issues* filed in WT Docket No. 94-147, a proceeding to which Sobel was not a party. The affidavit was drafted by B&S and sent to Kay who, after discussing it with B&S, secured Sobel's signature. Tr. 140-142, 154, 161, 370-371. Sobel did not review the motion, did not see a copy of it, and was not familiar with its contents. Tr. 162-163. The ALJ's ruling is tantamount, then, to finding that a non-party witness lacks candor when he does not *sua sponte* testify to things he was not asked.

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conclusions on the issue, *see Sobel's Reply to the Wireless Telecommunications Bureau's Proposed Findings of Fact and Conclusions of Law* at 1-16, which the ALJ ignored entirely, without comment or explanation.

[23] The Commission is not bound by the ALJ's if its own findings are supported by substantial evidence. *See WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1141 (D.C. Cir. 1985). The Commission must make a fair estimate of the relevant evidence and not merely rubber stamp the findings of the presiding officer. *Sun Over Jupiter Broadcasting, Inc.*, 8 FCC Rcd 8206, 8208 (Rev. Bd. 1993), *citing generally to Allentown Broadcasting Corp. v. FCC*, 349 US 358 (1955); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489-90 (1951) (Frankfurter, J.); *Lorain Journal Co. v. FCC*, 351 F2d 824, 828 (D.C. Cir 1965), *cert. denied sub nom. WWIZ, Inc. v. FCC*, 383 U.S. 967, *rehearing denied*, 384 U.S. 947 (1966).

[24] That fact alone justified Sobel's belief that there was nothing inconsistent between the affidavit and the agreement.

There are six distinct factual assertions made in the affidavit. The Bureau and the ALJ question the veracity of only three which we now address seriatim:

(a) "Kay has no interest in any radio station or license of which [Sobel is] the licensee."

The ALJ found that Sobel lacked candor in denying that Kay had an "interest" in Sobel's licenses without specifically disclosing the full details of the business relationship between him and Kay. But at the time Sobel signed the affidavit, the Commission had raised no question regarding the nature or validity of the business relationships between Sobel and Kay. Sobel was not responding to an expressed concern about real party in interest or transfer of control, nor was there any indication that the Commission suspected such. The designation order in WT Docket No. 94-147 listed Sobel's licenses as belonging to Kay, not because there had been an unauthorized transfer of control, but rather on the mistaken theory that Marc Sobel was a fictitious alias used by Kay. Sobel's primary focus and his entire mindset at the time he signed the affidavit was simply to clarify that he was a separate entity from Kay. He trusted his attorneys to draft the document necessary to convey this, and they prepared the affidavit which, upon finding it factually accurate, he signed.

Sobel's interpretation of the word "interest" as not incorporating the management agreement with Kay was made in good faith. The same lawyers who prepared the management agreement that Sobel and Kay had re-executed less than a month earlier also prepared the affidavit. Sobel had no reason to expect that his attorneys would ask him to sign an inconsistent statement. Sobel testified that he interprets the word "interest" to mean an "ownership" interest in the licenses. Sobel was (and remains) the licensee of the 800 MHz stations and thus considered himself to be the owner of the licenses. Tr. 146-147. The licenses were issued in his name, sent to his address, and operations under them were undertaken only by reason of business arrangements made by him. Kay owned the equipment, but he leased it to Sobel for use in the stations. Kay contracted with end users and collected the revenues for service, but only as a reseller, not as the licensee.

He did not consider this as giving Kay an "interest" in the licenses. And while the written agreement gave Kay an option to acquire the stations, Sobel did not believe this would give Kay an "interest" in the licenses unless and until (a) Kay exercised the option, (b) the Commission approved an assignment of the licenses, and (c) the deal was closed. Tr.148, 269-270.

(b) Sobel is "not an employer or employee of Mr. Kay".

Pointing to the services performed by Sobel for Kay as an independent contractor, the ALJ found that this statement was erroneous or misleading. Absent from the record, however, is any indication that Sobel intended to mislead the Commission or to conceal information. Sobel is a businessman. When business people use the term

"employee" they naturally assume the literal Internal Revenue Service meaning of the term. This distinction has very important legal consequences, *e.g.*, whether income taxes and social security must be withheld from payments, whether workman's compensation regulations apply, *etc.* It is only natural, therefore, that when an entrepreneur uses the word "employee," he means it in this literal sense. The record is clear that Sobel is a separate and distinct business entity from Kay. Sobel maintains his own business office to which Kay does not have access. Tr. 229-230, 285-287. Sobel provides, markets, contracts, and bills for his own UHF repeater services, with no involvement from Kay. Tr. 119, 287. Only about 10 to 15 percent of Sobel's gross business revenue is attributable to contract services and equipment sales to Kay. Tr. 251-257. Sobel owns and uses his own equipment, Tr. 229-230, 249, determines his own schedule and hours, Tr. 247-248, and provides services to Kay only on an "as-needed" basis. Tr. 327-328. Sobel has never received an IRS Form W-2 from Kay. Tr. 247. The arrangement between Sobel and Kay satisfies the IRS guidelines for independent contractor status. Tr. 247. Kay considers Sobel not an employee, but rather his "equal in the radio business." Tr. 327.

(c) *"Kay does not do business in [Sobel's] name and [Sobel] do[es] not do business in [Kay's] name".*

The ALJ erroneously deemed this statement false or misleading because Sobel sometimes contacts existing or potential customers on Kay's behalf, and because Kay contracts with the end users for service on Sobel's 800 MHz stations and collects the revenues for such services. The record overwhelmingly demonstrates that all services performed by Sobel on Kay's behalf were done as an independent contractor. *See* Section C.1.(b), above. The mere subcontracting of some aspect of a business operation, especially when done on a case-by-case basis, does not transform the subcontractor into one doing business in the principal's name. Nor does Kay's contracting, billing, and collecting for services to end users mean he is doing business in Sobel's name. Kay is acting as a reseller, and is thus acting on his own behalf, not Sobel's. *See* Section B.1, above.

2. Lack of Deceptive Intent

Assuming, arguendo, that the affidavit is inaccurate, incomplete, or misleading in any way, the record does not support the conclusion that Sobel offered it with deceptive intent. The very existence of the written management agreement in and of itself belies an intention on Sobel's part to conceal it. Sobel and Kay operated under the oral arrangement for more than two years before entering into any form of written agreement. Tr. 258. Sobel trusted Kay, was happy with the arrangement, and was not displeased in any way with Kay's performance. Tr. 258. Tr. 263. If Sobel had wanted to conceal his arrangement with Kay, he certainly would not have had it reduced to writing. The written agreement was prepared solely to document that Kay and Sobel were distinct business entities if that was